COMMENTS IN RESPONSE TO THE EXAMINER'S REJECTION

35 U.S.C. § 102(b) Rejection

The Examiner rejected, *inter alia*, independent claims 1, 11, 26, 38, 57, and 58 as being anticipated by U.S. patent number 5,920,701 to Miller et al. (*Miller*). Applicants respectfully traverse as set forth below.

CLAIM 1

Requesting a Transfer of a File From a Source Device

The first step of claim 1 recites "requesting a transfer of a file from a source device." *Miller* does not teach this claimed limitation. The Examiner referred to as element 100 of Figure 3 as evidencing a request for a transfer and element 22 of Figure 1 as evidencing a file at a source device; Applicants respectfully traverse. See *Office Action*, 2. Upon a closer reading of *Miller*, it is evident that element 100 is actually *step* 100 wherein "the scheduling of data transmission . . . commences in step 100 with **the scheduler 10** receiving signals via the network from the content sources 12, 14." Col. 6, l. 8-12 (emphasis added). Scheduler 10 does not make a transfer request of *any* source device and especially not of subscriber 22. Scheduler 10, as the name suggests, merely "schedules data transmission." Col. 4, l. 38-39. Furthermore, the signals received by the scheduler are not files but solely for "notify[ing] the scheduler 10 of the existence of data." Col. 6, l. 12-13. *Miller*, therefore, actually describes a device for scheduling transmission of data and receiving notifications as to the existence of data. *Miller* does not, as contended by the Examiner, teach requesting a transfer of a file from a source device.

Additionally, element 22 is "one or more **subscribers**." Col. 4, l. 57 (emphasis added). The scheduler 10 of *Miller* does **not** request a transfer of a file from subscriber 22. See, e.g., Figure 1 (concerning flow direction of transmission arrows). A

15

subscriber — as the name suggests — would be the end-user *receiving* content, not *providing* content. See *Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1298 (Fed. Cir. 2003) (finding words to be presumed to take on their ordinary and customary meaning absent express intent to the contrary). As *Miller* fails to teach each and every limitation of claim 1, *Miller* cannot be said to anticipate claim 1 and the Examiner's rejection is overcome. See *Southwall Technologies, Inc. v. Cardinal, IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995).

Transferring the File from the Source Device to a Destination Devivce

The Examiner also asserts *Miller* to teach "transferring the file from the source device (16, fig 1, col 4, lines 56-59) to a destination device (22, fig 1, col 4, lines 56-59), where the file transfer is complete by the deadline (delivered by the requested delivery time, col 4, lines 45-56)." *Office Action*, 3. Applicants, again, respectfully traverse the Examiner's assertions. Applicants note that the claimed *source device*, according to the Examiner's present rejection, is *now* allegedly anticipated by *element 16* of Figure 1. The Examiner had, however, *previously* identified the source device as element 22 — 'one or more subscribers.' The Examiner's reference to element 16, in addition to lacking antecedent consistency, still inherently fails to refer to a source device as element 16 is "one or more replicated servers." Col 4, l. 39-40; see MPEP § 2173.05(e). A replicated server, as the name suggests, is not a source of content but a means of replicating previously provided content. See *Brookhill-Wilk 1*, 334 F.3d at 1298. Again, as *Miller* fails to teach each and every limitation of claim 1, *Miller* cannot be said to anticipate claim 1 and the Examiner's rejection is overcome. See *Southwall*, 54 F.3d at 1575.

Applicants also note that the claimed destination device and the Examiner's assertion that the device is anticipated by element 22 is inconsistent with the remainder of the Examiner's rejection. The Examiner previously identified element 22 as the *source device*. The Examiner's rejection, therefore, lacks antecedent consistency. See MPEP § 2173.05(e). The Examiner's reference to column 4, lines 56-59 also fails to evidence anticipation of this claimed limitation in that this particular section discusses "[d]ata

16

[being] delivered to the *replicated servers* 16, 18, 20" and that the data "can be retransmitted to one or more *subscribers* 22_1, 22_2, 22_3, ... 22_N." Col. 4, l. 56-58 (emphasis added).

The Applicants question how data can be transferred from a source device (22), as noted on page 2 of the *Office Action*, and then be delivered to a destination device (22) as noted by the Examiner on page 3 of the *Office Action*. That is, according to the Examiner's rejection, data is *requested from* and subsequently *delivered to* the same locale of *Miller*—element 22.

CLAIM 11

The Examiner also rejected claim 11 of the present application in asserting *Miller* to disclose "a destination device . . . configured to send a request for transfer of a file" and "a source device . . . configured to transfer the file to the destination device." *Office Action*, 3. The Examiner identified element 22 and 16 of *Miller* as anticipating the claimed destination and source devices, respectively. Applicant respectfully traverses.

Figure 1 of *Miller* evidences a scheduler (10); content sources (12, 14); replicated servers (16, 18, 20) and subscribers (22_1, 22_2, 22_3, ... 22_N). Subscriber 22, in *Miller*, does not request a transfer of a file from replicated server 16 as asserted by the Examiner. A closer reading of *Miller* evidences that "scheduler 10 receiv[es] signals via the network from the **content sources** 12, 14." Col. 6, l. 10-12 (emphasis added). These signals identify certain "transfer parameters" such as "desired delivery time." Col. 6, l. 13, 15. For example, "if a content source 12, 14 provides an on-line magazine, the replicated servers 16, 18, 20 will require updates on a weekly or monthly basis. Therefore, the **content source** 12, 14—not the destination device—will set a desired delivery time depending on the frequency at which an update is needed." Col. 6, l. 23-28.

In *Miller*, a destination device (22) is not sending a **request** for a transfer. Instead, content sources (12, 14) are expressly **instructing** the scheduler (10) when to **provide** that information to replicated servers 16, 18, 20. Additionally, *Miller* does not

disclose a source device (16) transferring a file to a destination device (22) in response to that request. Instead, *Miller* teaches content source 12, 14 providing information to replicated servers 16, 18, 20 on a given schedule as instructed by the content source 12, 14. As *Miller* fails to teach each and every limitation of claim 11, *Miller* cannot be said to anticipate claim 11 and the Examiner's rejection is overcome. See *Southwall*, 54 F.3d at 1575.

CLAIM 26

The Examiner rejected claim 26 asserting *Miller* too teach "identifying a file to be transferred to a destination device" in addition to "selecting a source device." *Office Action*, 4. Applicants respectfully traverse the Examiner's assertions.

Identifying a File

The Examiner asserts identification of a file to be transferred to be disclosed at Col. 4, l. 47-59 of *Miller*. See *Office Action*, 4. Nowhere in this portion of *Miller* is there any disclose of selecting a file. This portion of *Miller* only discloses a "scheduler 10 mak[ing a] transmission . . . based on such parameters as the bandwidth available for data transmission over the communications network 24." Col. 4, l. 48-51. This portion of *Miller* identifies further parameters such as "the time available for transmission," "the amount or size of the data to be delivered," "the availability of multicast address," and "transmission priority levels." Col. 4, l. 51-55. The remainder of this portion of *Miller* merely notes that "[d]ata delivered to the replicated servers . . . can be retransmitted to one or more subscribers . . . over further communications networks." Col. 4, l. 56-59. This portion of *Miller* in no way teach **identifying a file to be transferred**.

In contrast, the present application describes identification of a file in the context of "select[ing] content for delivery." P. 19, l. 8. For example, "[t]he user may **select** content by choosing from a display of available content on a web site viewed by a standard browser." P. 19, l. 8-9 (emphasis added). Identification of content is further

described in the context of a "central server 114 identif[ying] a present location of the content (source) such that delivery of the content to client 112 is optimized." P. 21, l. 11-12. For example, "[t]he choice of location may be based on several factors, such as proximity of a source to client 112 and available bandwidth between the source and client 112." P. 21, l. 12-14.

The Examiner's reference to "the size of the data related to the file" in no way corresponds to the step of identification as exemplified by the Applicants. *Office Action,* 4. The Examiner's reference, in fact, concerns the aforementioned scheduler making a transmission based on certain conditions or parameters—bandwidth, multicast availability and file size. See Col. 4, l. 48-56. *Miller,* in this regard, cannot be said to disclose the identification of a file for transfer. As *Miller* fails to teach each and every limitation of claim 26, *Miller* cannot be said to anticipate claim 26 and the Examiner's rejection is overcome. See *Southwall,* 54 F.3d at 1575.

Selecting a Source Device

A similar argument is made with regard to the Examiner's assertion that *Miller* discloses selecting a source device. That portion of *Miller* identified by the Examiner— col. 4, l. 56-59—simply states that "[d]ata delivered to the replicated servers 16, 18, 20, can be retransmitted to one or more subscribers . . . of the content sources 12, 14 over further communications networks 26, 28." Col. 4, l. 56-59. This portion of *Miller* cannot be said to disclose any aspect of 'selecting a source device' as is claimed by the Applicants. *Miller,* in this regard, merely states the *possibility* of retransmitting delivered data. There is no mention of *selection* of a device for delivery of that data. In fact, *Miller's* preferred embodiment of **multicast transmission,** that is, simultaneously sending the same message to recipients over a network, suggest a total lack of selection and, instead, a mere mass-transmission of information. See Col. 4, l. 47. As *Miller* fails to teach each and every limitation of claim 26, *Miller* cannot be said to anticipate claim 26 and the Examiner's rejection is overcome. See *Southwall,* 54 F.3d at 1575.

CLAIM 38

The Examiner rejected claim 38 "for the same reasons as claim 11." *Office Action*, 4. As shown in the discussion of the claim 11 rejection, however, claim 11 is not anticipated by *Miller*. Therefore, claim 38 is allowable for the same reasons as claim 11.

CLAIM 57

The Examiner rejected claim 57 "for the same reasons as claim 1." *Office Action*, 4. As shown in the discussion of the claim 1 rejection, however, claim 1 is not anticipated by *Miller*. Therefore claim 57 is allowable for the same reasons as claim 1.

CLAIM 58

The Examiner asserts claim 58 to be anticipated by *Miller* in that *Miller* supposedly discloses "a plurality of servers (12, 14, fig 1) configured to deliver content to the devices in the network (col 4, limes (sic) 35-40)" and "a plurality of clients configured to receive content from the plurality of servers (22, fig 1, col 4, lines 56-49 (sic))." *Office Action*, 4. Additionally, the Examiner asserts *Miller* to disclose "a scheduling module configured to determine schedules for delivery of content from the plurality of servers (16, 18, 20, fig 1) to the plurality of clients (col 4, lines 46-59)." *Office Action*, 4-5. Applicants respectfully traverse.

The Examiner identifies content servers 12 and 14 as delivering content to subscribers 22. Upon a closer reading of *Miller*, however, it becomes evident that content servers 12 and 14 do **not** deliver content to subscribers 22. See, e.g., Figure 1. *Miller* also notes that "[d]ata delivered to the **replicated servers** 16, 18, 20 can be **retransmitted** to one or more **subscribers** 22_1, 22_2, 22_3, . . . 22_N of the content sources 12, 14 over further communications networks 26, 28." Col. 4, l. 56-59 (emphasis added). That is, content sources 12, 14 do *not* deliver content to the clients but to a replication

20

server 16, 18, 20. Likewise, the subscribers 22_1, 22_2, 22_3, . . . 22_N of *Miller* are receiving content from replication servers 16, 18, 20 and not content sources 12, 14.

Additionally, the Examiner identifies a *different* 'plurality of servers' in the third claimed element (16, 18, 20) as they relate to a scheduling module than in the first claimed element (12, 14) of the presently claimed invention. The Examiner's references ignore the antecedent relationship between '*the* plurality of servers' in the third element as they relate to '*a* plurality of servers' in the first element. See MPEP § 2173.05(e).

Further, the scheduler 10 of *Miller* interacts with **source servers** 12, 14 and not **replicated servers** 16, 18, 20. See Col. 6, l. 10-14. As such, *Miller* does not disclose a scheduling module configured to determine schedules for delivery of content from the plurality of servers to the plurality of clients. *Miller* instead discloses a scheduler 10 configured to determine schedules for delivery of content from the content source 12, 14 to the replicated servers 16, 18, 20. As *Miller* fails to teach each and every limitation of claim 58, *Miller* cannot be said to anticipate claim 58 and the Examiner's rejection is overcome. See *Southwall*, 54 F.3d at 1575.

DEPENDENT CLAIMS 2, 4-10, 12-18, 20-21, 27, 29-36, 39-40, 43 and 46-49

As evidenced above, independent claims 1, 11, 26, 38, 57 and 58 are not anticipated by *Miller*. Claims 2, 4-10, 12-18, 20-21, 27, 29-36, 39-40, 43 and 46-49 depend from these independent claims. As a dependent claim represents "a further limitation of the subject matter claimed" and "shall be construed to incorporate by reference all the limitations of the claim to which it refers," Applicants contend the dependent claims of this application are also novel over *Miller* as *Miller* fails to disclose each and every limitation set forth therein. 35 U.S.C. § 112, ¶ 3.

35 U.S.C. § 103 Rejection

The Examiner rejected dependent claims 3 and 19 for lack of non-obviousness over *Miller* in view of U.S. patent number 6,560,651 to Katz et al. (*Katz*). See *Office Action*, 9-10. The Examiner also rejected dependent claims 22-25, 28, 37, 41-42 and 52-56 for lack of non-obviousness over *Miller* in view of U.S. patent number 6,061,504 to Tzelnic et al. (*Tzelnic*). See *Office Action*, 10-12. The Examiner further rejected dependent claim 51 for lack of non-obviousness over *Miller* in view of *Tzelnic* in further view of U.S. patent number 6,052,710 to Saliba et al. (*Saliba*). See *Office Action*, 13-14. The Examiner also rejected dependent claims 44 and 45 for lack of non-obviousness over *Miller* in view of U.S. patent number 6,775,655 to Peinado et al. (*Peinado*). Applicants respectfully traverse.

Each of the Examiner's 35 U.S.C. § 103 rejections rely on *Miller*. The Examiner contends *Miller* to anticipate each of the independent claims in the present application. Each of the aforementioned claims is dependent (either directly or via an intermediate dependent claim) upon one of the independent claims previously rejected by the Examiner per *Miller*. Applicants believe the Examiner's anticipation rejections per *Miller* to have been overcome. As such, Applicants contend—without waiving the right to comment on the propriety of the Examiner's obviousness combinations should the Examiner disagree as to the Applicants' counters of *Miller*—each of the claims rejected on reliance of *Miller* are therefore allowable over the Examiner's cited prior art. See *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988); see also MPEP § 2143.03.

CONCLUSION

Applicants contend the Examiner's rejections with regard to each of the independent claims in light of *Miller* to have been overcome.

As each independent claim is allowable, each dependent claim—whether rejected in light of *Miller* or under 35 U.S.C. § 103—are also allowable for at least the same reasons in that they represent further limitations of the more broadly claimed independent base claims.

The Examiner is invited to contact the Applicants' undersigned representative with any questions concerning this response.

Respectfully submitted,
Ray Milkey et al.

April 5, 2005   By: _____

Susan Yee (Reg. No. 41,388)
Carr & Ferrell *LLP*
2200 Geng Road
Palo Alto, CA 94303
T: 650.812.3400
F: 650.812.3444